NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

United Brotherhood of Carpenters, Local 43 and New England Regional Council of Carpenters (McDowell Building & Foundation, Inc.) and Kevin Lebovitz. Case 34–CB–3047

August 26, 2010

DECISION AND ORDER

By Chairman Liebman and Members Schaumber and Becker

On December 31, 2009, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 354 NLRB No. 122. Thereafter, Respondent Carpenters Local 43 filed a petition for review in the United States Court of Appeals for the D.C. Circuit, and the General Counsel filed a cross-application for enforcement. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the Board issued an order setting aside the above-referenced decision and order, and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.²

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order to the extent and for the reasons stated in the decision reported at 354 NLRB No. 122, which has been set aside and which is incorporated herein by reference, except as modified below.

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

At slip opinion page 1, substitute the following for the first three sentences of the fourth full paragraph, ending with "Council local":

"The judge found that the Respondents' maintenance of the mobility clause violated Section 8(b)(1)(A) of the Act. We agree with the judge's conclusion. The mobility clause operates as an exception to geographic restrictions on signatory employers' hiring previously contained in separate agreements between the locals in the New England Council and the multiemployer association of which employer McDowell Building & Foundation, Inc. was a member. As explained by the Unions, 'While this provision replaced the terms of the old local hiring requirement, it did not eliminate them. Thus, in the event an employer's employees do not satisfy the mobility rule . . . , the default rule remains a local hiring requirement.' Brief at 5. In other words, in order for an employee from outside the local's geographic jurisdiction to be hired, the employee must satisfy the two prongs of the mobility clause: (1) the employee must have worked for the employer for a minimum of 3 weeks in the previous 5 months and (2) the employee must be 'a member in good standing of any local affiliate of the New England Regional Council of Carpenters.' It is the second prong that is at issue here.

On its face, the second prong of the clause appears to be an unlawful requirement that employees be members of a local union prior to hiring. Even if the requirement is construed to reduce the obligations of membership to its financial core, the clause appears to require membership in good standing prior to or at the time of hiring rather than 7 days thereafter as permitted by the proviso to Section 8(a)(3) as modified by Section 8(f). The Unions argue that the clause should be further construed to require only financial core membership after the 7th day of employment and that all employees who satisfy the first prong of the requirement will, necessarily, satisfy the second because "the mobility exception to the local hiring restriction applies only to those who have worked for 3 weeks for the employer. By definition, such 3 week employees will have been subject to the seven day security clause." Brief at 12. But this is not the case for several reasons. First, an employee who was employed by signatory employer for a minimum of 3 weeks in the previous 5 months might not have been a member in good standing and might not have satisfied his or her financial obligations to the Unions. Most obviously, such an employee might have left employment when the union-security clause was enforced against him or her. Second, the proviso to Section 8(a)(3) combined with Section 8(f) permit a requirement that employees become members within 7 days of hire. Even as construed by the

² Consistent with the Board's general practice in cases remanded from the courts of appeals, and for reasons of administrative economy, the panel includes the members who participated in the original decision. Furthermore, under the Board's standard procedures applicable to all cases assigned to a panel, the Board Members not assigned to the panel had the opportunity to participate in the adjudication of this case at any time up to the issuance of this decision.

Unions, the mobility clause requires membership during a period prior to hire. Third, if the second prong of the mobility clause is construed as suggested by the Unions, it is superfluous because its requirement is necessarily satisfied by the first prong,³ and also because it is redundant of the union-security provision. The proposed construction is thus not a reasonable one."

Also on page one, insert the following at the end of the fourth full paragraph, before footnote four:

"The Unions argue that Lebovitz was in compliance with the second prong of the mobility clause and thus, even assuming the Unions invoked the clause and thereby caused him to leave employment, the Unions invoked only the lawful prong of the clause. But our precedent does not permit such detailed splicing of an unlawful clause. See *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006)."

Dated, Washington, D.C. August 26, 2010

Wilr	na B. Liebman,	Chairman
Peter	r C. Schaumber,	Member
Crai	g Becker,	Member
AL) NATIONAL LABOR RELATIONS		RELATIONS BOARD

³ The Unions expressly argue that the second prong is superfluous: "The only real operative 'requirement' for satisfaction of the mobility clause, then, is the 3 weeks of employment requirement." Br. at 13 "The reference to 'members' in the current clause in essence is superfluous." Br. at 13.